Office Supreme Court, U.S.
FILED
JUN 13 1962
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IN THE

# Supreme Court of the United States

No. 177

LEWIS ORGEL and THE MICHIE COMPANY,

*Petitioners,*

*against*

CLARK BOARDMAN CO. LTD. and ALFRED D. JAHR,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on March 27, 1962 to the extent set forth herein.

## CITATIONS TO OPINION AND JUDGMENT BELOW

The opinion of the District Court (R. 34a-57a) printed in Appendix B hereto, *infra*, p. 18, is reported only at 128 U.S.P.Q. 520. The opinion of the Special Master printed in Appendix B hereto *infra*, p. 45, is unreported. The memorandum opinion of the District Court confirming the Master's Report as modified (R. 58a-60a) printed in Appendix B hereto, *infra*, p. 55, is reported only at 128 U.S.P.Q. 532. The judgment entered on the opinion of the District Court (R. 61a-64a) is printed

in Appendix B hereto, *infra*, p. 58. The opinion of the United States Court of Appeals (R. 94a-100a) printed in Appendix B hereto, *infra*, p. 62, is reported in 301 Fed. 2d 119. The judgment of the United States Court of Appeals for the Second Circuit (R. 101a) is printed in Appendix B hereto, *infra*, p. 69.

## JURISDICTION

The judgment herein was entered on March 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## THE QUESTIONS PRESENTED

A—Whether the profits earned by persons who infringe a law treatise copyright are subject to allocation between the copyright owner and the infringer even though the infringer offers no testimony as to the value of the material which he allegedly contributed. (17 U.S.C. 101 (b)).

B—Whether a United States Court of Appeals has the right in a copyright infringement case to reduce an allowance for counsel fees made by the District Court where there is no finding that the District Court abused its discretion and where there is no evidence offered that the fees allowed were excessive. (17 U.S.C. § 116).

## STATUTES INVOLVED

The decision below involved the interpretation of Sections 101(b) and 116 of the Copyright Act (July 30, 1947, Ch. 391, 61 Stat. 661, 665). They are printed in Appendix A, *infra*, p. 14.

## STATEMENT

The petitioners commenced an action against the respondents for violation of a copyright of a law book entitled "Orgel, Valuation Under the Law of Eminent Domain". The jurisdiction of the District Court was invoked in this case because the case arose under Title 17 U.S.C. 101. The District Court found that the respondents had violated the petitioners' copyright by appropriating a large portion of the individual petitioner's law treatise which dealt with valuation (R. 57). The matter was referred to a Special Master.

The petitioners offered evidence that the damages which they suffered as a result of loss of sales of the Orgel book were $27,962.00. The conceded profits actually earned by the respondents were $12,849.32. The respondents offered no testimony as to what, if any, proportion of the book not copied from the petitioners' book contributed to the profits. The Master found that the profits actually earned by the respondents were $12,849.32. He also found that physically 35% of the individual respondent's work was expropriated from the individual petitioner's book. He therefore recommended that 35% of the profits, or $4,497.27, be awarded to the petitioners. In addition, however, he awarded as a matter of appropriate equitable relief to the petitioners an additional sum of $7,000.00 for the damages which they suffered, making a total award of $11,497.27 (Appendix B, p. 45). In addition to the award made, the Master also, based upon the testimony presented before him, allowed a counsel fee of $10,000.00 to petitioners. Objections were filed by both petitioners and respondents to the Master's Report. The petitioners objected to the Report on the ground that it recommended allocation of profits, that it had rejected petitioners' proof of damages, and

that it had limited petitioners' counsel fee to $10,000.00, although the uncontradicted expert testimony was that the services were worth $25,000.00. Respondents objected on the ground that the Report allowed $7,000.00 as damages over and above the allocated profits, and that it allowed any counsel fee.

The objections were argued at length before the District Court. The Court, in its memorandum decision (R. 55) held that the petitioners were entitled to receive respondents' entire profits in the amount of $12,849.32, struck out the additional award of $7,000.00 for general damages, and approved the award of counsel fees in the sum of $10,000.00.

The Circuit Court of Appeals affirmed the judgment of the District Court to the extent that the judgment found that respondents had violated petitioners' copyright, but modified the judgment by awarding to the petitioners only 50% of the respondents' profits and by cutting the allowance of counsel fees from $10,000.00 to $5,000.00. This it did even though in its opinion it stated that the respondents had failed to show with any certainty the portion of the sales attributable to the plagiarized portion of the book. In so modifying with reference to the allocation of damages, the Court indicated that it believed it was following its previous decision in *Sheldon v. Metro Goldwyn Pictures Corp.*, 106 Fed. 2d 45, aff'd. 309 U.S. 390 (1940). It, however, conceded that the conclusion it had reached, ostensibly on the authority of the *Sheldon* case, was contrary to the conclusion reached by the United States District Court for the District of Massachusetts on precisely the same question (*Sammons v. Larkin*, 38 Fed. Supp. 649). With reference to its action in cutting the allowance of counsel fees from $10,000.00 to $5,000.00, it made this reduction

without any finding that the District Court's allowance was an abuse of discretion or was not supported by the evidence.

## REASONS FOR GRANTING THE WRIT

A. With reference to the question involving the allocation of profits:

The question of the allocation of profits involves an interpretation of Section 101(b) of the Copyright Act. The decision of the Court below is squarely contrary to the holdings of this Court (Rule 19(b) of the Rules of the Supreme Court).

The Court below, in modifying the judgment of the District Court, found that, even without any evidence as to the contribution made by the infringer to the sales producing the profits, it could, as a matter of discretion, without such evidence, allocate the profits on some basis which it failed to define. This conclusion is directly contrary to the holdings of this Court in precisely similar cases dealing with plagiarism of law books. In *Callaghan v. Myers*, 128 U.S. 617, it was recognized that a large portion of the infringing work was not covered by the plaintiff's copyright. It was argued that only a portion of the profits should therefore be allowed to plaintiff. This Court rejected that argument, holding:

> "The present is one of those cases in which the value of the book depends on its completeness and integrity to be sold as a book and not as a fragment of a book. In such a case, as the profits result from the sale of the book as a whole, the owner of the copyright will be entitled to recover the entire profits from the sale of the book."

A similar conclusion was reached by this Court in a

subsequent case, *Belford, Clarke & Co. v. Scribner*, 144 U.S. 488. The cases where allocation of profits have been allowed have mainly involved motion pictures based upon an infringement of the plaintiff's copyright of a play. Even in these cases the courts have been careful to point out that the burden of proving the allocation is squarely upon the infringing defendant, and if the defendant fails to put in any proof all the profits must be paid to the plaintiff whose copyright has been infringed. In the very case which the Court of Appeals relied on in modifying the judgment with respect to allocation of profits (i.e., *Sheldon v. Metro Goldwyn Pictures Corp.*, 106 Fed 2d 45; aff'd. 309 U.S. 390 [1940]), the Court, speaking through Hand, J., at p. 49, stated:

> "The difficulties of separation have generally prevented infringers from attempting any apportionment; they have contented themselves with getting down the net profits as low as possible. That was the case in *Callaghan v. Myers; supra;* and in *Belford, Clarke & Co. v. Scribner*, 144 U. S. 488, 508, 12 S.Ct. 734, 36 L. Ed. 514; and for this reason the general language there used is not to be taken as holding that the infringer must always be unsuccessful, no matter what evidence he may bring forward. They hold no more than that when he makes no effort to discharge the duty resting upon him, he will be cast for the whole profit."

This Court, in affirming in the same case, stated, at 309 U.S. 390, at p. 406:

> "When there is a commingling of gains, he must abide the consequences, unless he [i.e., the infringer] can make a separation of the profits so as to assure to the injured party all that justly belongs to him."

The District Court for the District of Massachusetts, in *Sammons v. Larkin*, 38 Fed. Supp. 649, in a case where physical separation of the plagiarized material from that contributed by the infringer was much simpler than in the instant case, held that under the doctrine of this Court in the *Sheldon* case, cited above, the infringer, having failed to demonstrate that any sales were allocable to the part of the work done by him, must account for the entire profits.

Clearly, therefore, there is a conflict between the decision reached by the Court of Appeals with reference to the allocation of profits and the decisions of this Court.

In addition to this clear conflict with the decisions of this Court and the conflict with the decision in the *Sammons* case, supra, there is the fact that the question of determination of damages and the allocation of profits presents an important question in the construction and enforcement of the statutes relating to copyright. If the holding of the court below on the question of allocation of profits is to be established as law, then it should be done by this Court, and the holdings in *Callaghan*, *Belford* and *Sheldon* should be specifically overruled.

B—With reference to the question of modifying the attorneys' fees:

The decision of the Court below in modifying the attorneys fees allowed by the District Court involves an interpretation of the provisions of Section 116 of the Copyright Act (17 U.S.C. 116). Its decision is contrary to the holdings of the Courts of Appeals of other circuits (Rule 19(b) of the Rules of the Supreme Court of the United States).

Prior to the decision in the instant case, the Courts of Appeals, in a number of circuits (including the Court of

Appeals for the Second Circuit) have consistently held that awards of counsel fees by the District Courts, in cases where such awards are permissible, are binding upon appellate courts, unless there is an affirmative showing of abuse of discretion. This was the specific holding of the Court of Appeals for the Second Circuit in a case involving the review of a fee in a copyright matter, *Hendricks v. Thomas Publishing Co.*, 242 Fed. 37.

Similar decisions were reached in cases involving the review of counsel fees in other matters by the Court of Appeals for the Eighth Circuit (*Mercantile-Commerce Bank & Trust Co. v. Southeast Arkansas Levee District*, 106 Fed. 2d 966); for the Seventh Circuit (*Lackner v. Illinois Bell Telephone Co.*, 111 Fed. 2d 136, cert. den. 311 U. S. 652); and for the Tenth Circuit (U.S. v. *Anglin & Stevenson*, 145 Fed. 2d 622, cert. den. 324 U.S. 844).

In the instant case, the record is uncontradicted that counsel for the petitioners put in 1,500 hours over a period of more than six years in the trial of the case (R. 89a). One of the outstanding members of the Bar in the trial of copyright cases, Julian T. Abeles, testified that the fair and reasonable value of the services rendered by counsel for the petitioners was $25,000.00 (R. 93a). No testimony was offered by the respondents, who contented themselves with filing with the Court a list of fee awards to prevailing plaintiffs in other copyright cases.

The Court below made no finding that the fee allowed represented an abuse of discretion, but, rather, stated:

> "We feel that $10,000.00 is more than a liberal allowance and order the attorneys fees reduced to $5,000.00." (R. 100a).

This it did purely and simply on a finding that "since

such a provision for attorneys fees is at variance with the usual practice before our courts, however, it has been sparingly used and the amounts awarded modest."

The principle enunciated by the Court below that in copyright cases only a nominal fee shall be allowed to a prevailing plaintiff (for some reason liberal allowances are made to prevailing defendants) is contrary to the previous decisions of the various Courts of Appeals. The additional principle that, in copyright cases at least, the Court of Appeals has a general revisionary power over allowances made by the District Courts with respect to attorneys fees without a finding of abuse of discretion is also contrary to the decisions of the other circuits.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari limited solely to the questions of the allocation of profits and to the right to review counsel fees should be granted.

Respectfully submitted,

JAMES E. BIRDSALL
Counsel for Petitioners

# APPENDIX A

## Statutes

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TITLE 17 U.S.C., § 101. INFRINGEMENT

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction. — To an injunction restraining such infringement;

(b) Damages and profits; amount; other remedies. — To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where

such infringer shows that he was not aware that he was infringing a copyrighted work and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statue, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, $50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance;

(c) Impounding during action. To deliver up on oath, to be impounded during the pendency of the action,

upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright:

(d) Destruction of infringing copies and plates.—To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

(e) Royalties for use of mechanical reproduction of musical works.—Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: Provided also, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title.

by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

(f) Repealed. June 25, 1948, c. 646, § 39, 62 Stat. 992, eff. Sept. 1, 1948.

July 30, 1947, c. 391, § 1, 61 Stat. 652; June 25, 1948, c. 646, § 39, 62 Stat. 992.

TITLE 17 U.S.C., § 116. COSTS; ATTORNEY'S FEES

In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs. July 30, 1947, c. 391, § 1, 61 Stat. 652.

## APPENDIX B

### Opinions and Judgments Below

### Opinion of Dimock, D.J.

(Record, pages 505-528)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MEMORANDUM

DIMOCK, *D. J.*

This is an action for damages for copyright infringement, brought by the author of "Orgel on Valuation Under Eminent Domain" and his publisher against the author of Jahr on "Eminent Domain—Valuation and Procedure" and his publisher. The books will be hereinafter referred to respectively as "Orgel" and "Jahr". Orgel was published in 1936 and Jahr in 1953. Orgel is an exhaustive treatment of one phase of eminent domain. Jahr purports to cover not only the phase covered by Orgel—valuation—but also the procedure in eminent domain. There is no charge that Jahr infringes Orgel in any respect other than the treatment of valuation.

Access of the author of Jahr to Orgel on Eminent Domain is conceded. The originality of Orgel on Valuation is established. The only question is whether plaintiffs have sustained the charge that the individual defendant by copying plaintiff's book appropriated the labor of the author.

The similarity of plaintiffs' book and defendants' treatment of valuation is striking. Comparison of the table of contents of the part of Jahr which treats of valuation with the table of contents of Orgel on Valuation affords a good example of this similarity. There is given below a table showing the chapter and section headings from Jahr's chapters VI and IX through XXVII, being the whole of that work insofar as devoted to valuation. Opposite these are given corresponding chapter and section headings from Orgel. Because of the fuller treatment of the subject in Orgel it is natural that many subjects there treated are omitted in Jahr so that, while the section numbers in the following table from Jahr are consecutive, there are gaps in the section numbers from Orgel. In addition, there are cases where Jahr treats the subjects in a slightly different order and this has required a rearrangement of the numerical order of the Orgel section headings in some cases. These, however, are apparent from the table itself and the reader can judge how much importance should be attached to the difference in arrangement. Finally there are three chapters under which Jahr collects three groups of matters most of which are treated by Orgel incidentally in Orgel's chapters referred to elsewhere in the table.

## Comparison of the Chapter and Section Headings on Valuation in Jahr's "Eminent Domain" and Orgel's Valuation Under Eminent Domain"

| *Jahr* | *Orgel* |
|---|---|
| Chap. VI Constitutional and Statutory Requirements of Compensation | Chap. I Introduction |
| § 35 What is "just compensation" | § 1 Constitutional Requirement of "Just Compensation" Distinguished from Requirement of Compensation for all Injuries Resulting from an Act of Government |
| § 36 Just compensation — a constitutional guaranty | |
| § 37 Statutory provisions generally | § 3 Constitutional and Statutory Extensions of the Right of an Owner to Receive Compensation |
| § 38 Statutory provisions for awarding compensation | |
| § 39 Statutory provisions for determining compensation | |
| § 40 Statutory provisions for certainty of the fund | |

| *Jahr* | *Orgel* |
|---|---|
| CHAP. IX Valuation in Eminent Domain—Generally | CHAP. II "Fair Market Value as a Measure of Compensation |
| § 66 General Principles | |
| § 67 Three concepts of value | § 11 Three Possible Standards of Value |
| § 68 Value to the Taker | § 12 Value to the Taker |
| § 69 Value to the Owner | § 13 Value to the Owner |
| § 70 Market value | § 14 Market value |
| CHAP. X Valuation in Eminent Domain—Fair Market Value | |
| § 71 Market value not the invariable rule | § 17 Is "Market Value" the Invariable Nominal Rule, or Merely the Usual Rule? |
| § 72 Market value determined as of the date of the taking | § 20 The Time Factor in the Determination of Fair Market Value — Value as of the Time of the Taking |
| § 73 Market value and forced sale values | § 21 Forced-Sale Values |
| § 74 Market value and forced purchase prices or hold-up prices | § 22 Forced-Purchase or Hold-Up Prices |
| § 75 Market value as affected by boom prices | § 24 Boom Prices |

*Jahr*

CHAP. X

§ 76 Market value during a temporary economic depression

§ 77 Market value and hindsight

§ 78 Adaptability of property as an element of market value

§ 79 Illegal uses as affecting market value

§ 80 Plottage as an element in valuation of property

§ 81 Corner, key, and multiple frontage as elements of valuation

CHAP. XI Valuation in Eminent Domain—When Fair Market Value Inapplicable

§ 82 Cases where "fair market value" is unworkable

*Orgel*

CHAP. II

§ 23 Values in a Temporarily Depressed Real-Estate Market

§ 26 The Possible Use of Hindsight in Fixing Market Value as of a Previous Date

§ 32 Market Value as Enhanced by Present Illegal Uses

§ 34 Fair Market Value as Affected by the Area of the Property — "Plottage"

CHAP. III Value to the Owner as a Factor in Fair Market Value or as an Inpendent Measure of Compensation

§ 37 Cases Where "Fair Market Value" is Held Inapplicable

*Jahr*

CHAP. XI

§ 83 Measure of compensation when property has no market

§ 84 Specialty Properties of non-profit organizations

§ 85 Specialty Properties producing revenue

§ 86 Properties in which owner's use is restricted

CHAP. XII Valuation in Eminent Domain—Value to the Taker—

§ 87 Introduction

§ 88 Value to the taker as affecting market value

§ 89 Special adaptability of property to taker's use

§ 90 Value of property to other potential condemnors as affecting market value

*Orgel*

CHAP. III

§ 38 Measure of Compensation When "Fair Market Value" is Not Accepted

§ 39 Properties Used for Service, Not for Profit

§ 40 Property Used in Profit-Making Enterprises

§ 41 Property Held under a Tenure Which Restricts the Owner's Uses of the Property

CHAP. VI Value to the Taker

§ 80 Value to the Taker as Affecting Actual Market Value

§ 89 Special Adaptability Versus Value Based on the "Necessities of the Taker"

§ 88 Value to Other Potential Takers, Also Possessing Power of Eminent Domain

*Jahr*

CHAP. XIII. Valuation in Eminent Domain—Value Affected by Proposed Improvement—

§ 91 Introduction

§ 92 Enhancement in value caused by the anticipated public improvement

§ 93 Depreciation in value caused by anticipated public improvement

§ 94 Enhancement in value caused by successive public improvements

§ 95 Valuation as affected by statutory provisions

CHAP. XIV Valuation in Eminent Domain—Where Only a Part of Property is Acquired—

§ 96 Introduction

§ 97 What constitutes a partial taking

§ 98 The three methods of valuation

*Orgel*

CHAP. VIII Value as Affected by the Anticipated Benefits or Injuries from the Proposed Improvement

§ 96 Enhancement in Value Caused by the Prospective Improvement

§ 103 Value as Depreciated by Anticipated Injuries to Property from the Proposed Improvement

CHAP. IV Damages to Remaining Property—The Partial-Taking Cases

§ 46 What Constitutes a Partial Taking

§ 47 Three Alternative Formulas for Measuring "Just Compensation" in Partial-Taking Cases

*Jahr*

CHAP. XIV

§ 99 The usual rule—Value of the part taken plus the damages to the remainder

§ 100 Difference between the fair market value of the property before and after the taking

§ 101 The Louisiana Rule — Damage to remainder included in value of part taken

§ 102 The Massachusetts Rule

§ 103 Valuation of part taken where damages are allowed to remainder

§ 104 Valuation of damages to remainder

§ 105 Damages by reason of use of the part taken

§ 106 Remote and speculative damages not recoverable

*Orgel*

CHAP. IV

§ 49 The Usual Formula: "Value of the Part Taken Plus Damages to the Remainder"

§ 50 The Third Formula: "Difference between the Fair Market Value of the Property before and after the Taking"

§ 48 "Damages to the Remainder" included in the "Value of the Part Taken"

§ 54 The Massachusetts Increased-Proximity Rule

§ 51 Cases Where Compensation Is Measured by Value of the Part Taken Plus Damages to the Remainder — Valuation of Part Taken

§ 52 Damages to the Remainder

§ 55 Rule Limiting Damages to Those Resulting from the Use of the Particular Land That is Taken from the Owner

§ 58 Potential, Speculative and Remote Damages.

| *Jahr* | *Orgel* |
|---|---|
| CHAP. XV Valuation in Eminent Domain—Set-Off of Benefits Against Award | (Most of these matters are treated in the other chapters here cited) |
| § 107 Introduction — character of benefits, general or special | |
| § 108 Set-off of benefits against the value of the part taken, or from entire award | |
| § 109 Set-off of benefits against damage to the residue | |
| § 110 Special benefit assessments | |
| CHAP. XVI Valuation in Eminent Domain—Incidental Damages— | CHAP. V Value to the Owner —Incidental Damages |
| § 111 Distinguished from damages in a partial taking | |
| § 112 Cost of removal of personal property | § 67 Removal Costs and Breakages of Personal Property |
| § 113 Inability to find a new business location | § 73 Absence of Acceptable Substitute Location |

*Jahr*

CHAP. XVI

§ 114 Loss of profitable contracts by the taking of property

§ 115 Interruption of business and loss of good will

CHAP. XVII Valuation in Eminent Domain—Improvements Erected by Condemnor as Trespasser—

§ 116 The question presented

§ 117 The general rule of valuation

§ 118 The New York rule

§ 119 Cases in other jurisdictions

*Orgel*

CHAP. V

§ 70 Excess Cost of Securing Adequate New Premises Over and Above the Market Value of the Old Premises

§ 75 Loss on Profitable Contracts the Terms of Which Cannot be Enforced, or Are Subject to Change, Because of the Taking of the Premises

§ 71 Damages Expressed in Terms of Lost Opportunity to Secure an Income — Interruption of Business

§ 74 Loss of Good Will

CHAP. VII Valuation of Improvements Made by a Condemnor on Property Prior to Its Condemnation, as an Act of Trespass

§ 93 The New York cases

§ 94 Cases in Other Jurisdictions

| *Jahr* | *Orgel* |
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| CHAP. XVIII. Valuation of Encumbered or Divided Fee | CHAP. IX. Valuation of an Encumbered or Divided Fee |
| § 120 What constitutes an encumbered or divided fee | |
| § 121 Is the sum of the value of the separate legal interests equivalent to the value of the unencumbered fee? | § 106 Is the Market Value of the Fee Simple an Approximate Measure of Indemnity for the Loss of Separately Owned Interests in the Real Estate? |
| § 122 Tendency to value property taken as unencumbered | |
| § 123 Special cases where the usual rule is cast aside | § 109 Cases Where the Courts Have Departed from the Usual Doctrine That the Total Award Must Be Based on the Value of the Land as an Undivided Fee Simple |
| CHAP. XIX. Apportionment of Award | CHAP. X. The Apportionment of a Total Award Among the Various Interests in the Real Estate |
| § 124 The theory of apportionment | § 111 The General Legal Theory of Apportionment |

| *Jahr* | *Orgel* |
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| § 125 Liens for taxes | |
| § 126 Mechanic's liens and liens of judgment creditors | |
| § 127 Claims of mortgagees | § 113 Claims of a Mortgagee |
| § 128 Inchoate right of dower | § 115 Inchoate Right of Dower |
| § 129 Future interests in land | § 116 Future Interests—Life-Tenant, Remainderman |
| § 130 Leasehold interests and their valuation | § 118 Apportionment between Lessor and Lessee |
| § 131 Short term leases, fixtures and other apportionable interests | § 124 Short-Term Leases |
| CHAP. XX Valuation-Opinion Testimony | CHAP. XI Introduciton: Opinion Testimony |
| § 132 Admissibility of opinion testimony in eminent domain | § 129 Admissibility of Opinion Testimony |
| § 133 The expert or opinion witness in eminent domain | § 130 Competency of Opinion Witnesses — Testimonial Qualification |
| § 134 Basic support for expert's valuation | § 131 Basis of Opinions as to Value |
| § 135 Hypothetical questions | § 132 Hypothetical Questions |

| *Jahr* | | *Orgel* | |
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| CHAP. XXI - Valuation — Sales As Evidence of Value | | CHAP. XII - Sales and Offers as Evidence of Value | |
| § 136 | Sales of the property condemned | § 134 | Sales of Identical Property |
| § 137 | Sales of similar property in the locality | § 135 | Sales of Similar Property |
| § 138 | Proximity in time and similarity in market | § 137 | Similarity in Market Conditions - Proximity in Time |
| § 139 | Not all sales of similar property are admissible | § 138 | What Types of Sales Transactions May Be Considered in Estimating Market Value? |
| § 140 | In most jurisdiction sales data may be offered on direct examination | | |
| § 141 | The New York rule | § 140 | The New York Cases — Admissibility of Sales of Similar Property on Direct Examination |
| § 142 | Rule in minority of states | § 139 | The Minority Rule |
| § 143 | Cross examination and rebuttal testimony | § 142<br>§ 143 | Cross Examination<br>Rebuttal |
| § 144 | Admissibility of sales to the condemnor | § 146 | Sales to the Condemnor or to a Party Having the Power to Condemn |
| § 145 | Offers to buy or sell | § 147 | Offers |

*Jahr* *Orgel*

CHAP. XXII Income as Evidence of Value of the Real Estate

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| *Jahr* | *Orgel* |
|---|---|
| CHAP. XXV Principles of Valuation Applicable to Specific Subjects | (Most of these matters are treated in the other chapters here cited) |
| § 159 Acquisition of property for a limited term | |
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|---|---|
| CHAP. XXVII Valuation of Public Utilities | CHAP. XVII Valuation of Public Utilities for Condemnation or Purchase —General Principles |
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| § 173 Partial takings of utilities | |

Even where Jahr's section headings differ in form from the corresponding headings in Orgel the difference is usually cancelled out by the treatment of the subject in the body of the section. For example Jahr, in section 98, uses the heading, "The Three Methods of Valuation", and then, as the first, takes up, in section 101, "The Louisiana Rule—Damage to Remainder Included in Value of the Part Taken". Orgel, in section 47, had used the heading, "Three Alternative Formulas for Measuring 'Just Compensation' in Partial-Taking Cases". For his first example, Orgel followed with section 48, "'Damages to the Remainder' Included in the 'Value of the Part Taken'" without the words "The Louisiana Rule". In this section he cited and discussed a single case, Louisiana Soc. v.

Board of Levee Comm'rs, 143 La. 90, 78 So. 249, and ended with the statement, "Sound as is the position of the Louisiana court from the viewpoint of valuation theory, it has not been adopted by most courts as the rationale of the partial-taking cases."

No similar analysis of the subject of valuation preceded Orgel's. The subject is not one where a classic analysis has been followed through the years. None of the digests or encyclopedias or either of the two standard works on eminent domain, Lewis and Nichols, has ever used an analysis similar to Orgel's. For two minds independently to reach two such similar analyses would be an unbelievable coincidence.

As was said in Lawrence v. Dana, C. C. Mass., 15 Fed. Cas. 2660, No. 8136:

> "* * * [I]dentity of contents, arrangement, and combination, is strong evidence that the second book was borrowed from the first, because it is highly improbable that two authors would express their thoughts and sentiments in the same language, throughout a book or treatise of any considerable size, or adopt the same arrangement or combination in their publication."

There are many instances of almost verbatim identity of language in the two works. For instance, as part of the treatment of hold-up prices, Orgel, at page 72, uses this language:

> "The hold-up may be due either to the haste of the buyer to get the property, or to his special need for that particular property, arising out of its peculiar adaptability to his purposes."

Jahr at page 104 says:

> "The hold-up price may be due either to the haste

of the buyer to get the property, or to his special need for the particular property arising out of its peculiar adaptability for his purposes, * * *."

Orgel defines a forced sale on page 71 thus:

"It is a sale which the vendor must make in a great hurry, without taking a 'reasonable' time to find the most favorable buyer and to carry through the most favorable bargain with this buyer."

Jahr's definition at page 104 is:

"It is a sale which the vendor must make with great speed and expedition without taking a reasonable time to find a most favorable buyer."

In neither of these instances was there any citation of a judicial opinion which might have been the source of the language.

There are instances where the language is thus similar but in addition the thought is treated in the same rhetorical form. Thus Orgel introduces a subject by asking at page 82:

"May a jury take the 'abnormal' high prices into account, as affecting the 'fair market value of the property at the time of the taking?' "

Jahr's introduction at page 105:

"May the jury and the court take into account the abnormally high prices in fixing the fair market value as of the taking date?"

As a second example, Orgel, at page 84:

"Must a court or jury estimate the market value on the basis of these inflated values or will it adopt some other measure of just compensation, which discounts the war-time demand?"

Jahr, at a corresponding point, at page 106:

> "Will a court or jury estimate the market value on the basis of the prevailing wartime prices, or will the compensation be based upon some other market value which discounts the wartime demand?"

Again, Orgel for a heading for Section 106:

> "Is the Market Value of the Fee Simple an Approximate Measure of Indemnity for the Loss of Separately Owned Interests in Real Estate?"

Jahr, in his corresponding section head 121:

> "Is the Sum of the Values of the Separate Legal Interests Equivalent to the Value of the Unencumbered Fee?"

To illustrate a certain point, each of the works uses the same hypothetical illustration without citing a case to support it. Orgel says, at page 130:

> "If a university owns land forever limited to university use, and if the market value of the land is accepted as the basis of the award, the restriction will be a very significant item to consider. But if the value of the land to the university is to be taken, the market value of unrestricted land, since that represents an approximation to replacement cost, is *prima facie* a measure of the value of the land to the university. Market value of the unrestricted tenure would thus be evidence of value to the owner of the restricted tenure."

Jahr says, at page 121:

> "Take the case of a college campus where land is limited to educational purposes. If the market value of the land is accepted as the basis of valuation, the

restrictive use of the land would have a material influence. But if the value of the land to the owner is taken as a measure, we are compelled to value the land at replacement cost of adjoining unrestricted land. Thus land held under a restricted tenure by necessity of the case must be valued on the same basis as market value of unrestricted land."

The author of Jahr even makes the same suggestion as Orgel as to what should be a proper instruction to the jury in a certain case. Orgel at page 162 says:

"The doctrine would be clearly expressed if the courts were to direct a jury first to find the value of the whole and then to discover some basis (such as ratio of acreage of part taken to acreage of the whole) by which to allocate this value as between the two parts."

Jahr at page 139 says:

"A clear instruction to a jury in a partial taking case, where the jury is required to value the part taken, should consist of *first* a request to find the value of the entire property; *second*, to determine some ratio that the part acquired bears to the value of the whole property; and *third*, to apply that ratio to the value of the whole property to reach a determination of the value of the part taken."

Neither author cites any authority for his suggestion and each suggestion is ostensibly the author's contribution.

Striking words used in Orgel appear in similar usage in Jahr. In discussing the problem of improvements made by the condemnor before the date as of which value is fixed, Orgel says at page 311:

"This seemingly hopeless dilemma is avoided in the majority of jurisdictions by the rule that a con-

demnor need not pay for his own improvements when they have been made prior to the act of condemnation."

On this subject, Jahr says at page 163:

"Let us see how the courts meet this seemingly hopeless problem of valuation.

* * *

Out of this dilemma the courts adopted a compromise by considering the property as though the condemnor had not placed the improvements thereon, and paying therefor the 'market value' without the condemnor's improvements."

While the foregoing quotations afford what are probably the most flagrant examples of similarity between Jahr and Orgel, an even more persuasive demonstration that the author of the later work copied from the earlier one is found in the multiplication of like instances. Of Jahr's 202 pages devoted to valuation, 86 contain instances somewhat similar to those represented by the foregoing quotations.

In some cases the author of Jahr appears to have adopted statements from Orgel without independent research. Orgel, in discussing at page 457 the rule as to admissibility on direct examination of sales of comparable properties, states that in a number of jurisdictions the courts exclude this type of evidence on direct examination and cites in a footnote cases from California, Iowa, Kansas, Michigan and Ohio. Jahr at page 218 states that in some few jurisdictions evidence of sales of comparable properties can be adduced only on cross-examination and adds, "Among these states we find California, Iowa, Kansas, Michigan, and Ohio." No citations are given. As a matter of fact, between the time of publication of

Orgel and that of Jahr Minnesota joined this group of states in the case of Minneapolis — St. Paul Sanitary Dist. v. Fitzpatrick, 201 Minn. 442, 277 N. W. 394.

Jahr wrote his treatise 17 years after the publication of Orgel's but when he came to illustrate the judicial definition of market value and cited and quoted from the decisions of five states, four of these states were four of the five that Orgel had cited and quoted from on the same subject in his text and Jahr's quotations contained nothing not in Orgel. The only difference was that Jahr substituted a New York case for Orgel's Louisiana case. The New York case, Matter of Board of Water Supply, 277 N. Y. 452, had been decided since the publication of the Orgel work and Jahr came by it naturally as a New York lawyer engaged in that field. He paid no attention, however, to cases which had been decided in three other states since the publication of Orgel; Metropolitan Water Dist. v. Adams, Cal. Sup. Ct., 116 P. 2d 7; Pumphrey v. Tabler, 175 Md. 498, 2 A. 2d 668; State v. Lindley, 232 Mo. App. 831, 113 S. W. 2d 132, 137.

In discussing value as depreciated by anticipated injuries from a proposed improvement Orgel says, at page 351:

> "We have been unable to find a single case on the former proposition and only dicta in a few cases to bear out the latter point."

Jahr, page 130, says in almost identical words:

> "We have found no cases directly in point * * *."

As a matter of fact, the following cases directly in point had been decided prior to the publication of the Jahr work and after the publication of Orgel: Murray v. United States, D. C. Cir., 130 F. 2d 442; United States v. Certain Lands, etc., D. C. S. D. N. Y., 47 F. Supp.

934; Connor v. Metropolitan Dist. Water Supply Comm'n, 314 Mass. 33, 49 N. E. 2d 593.

Orgel's section 88, "Value to Other Potential Takers, Also Possessing Power of Eminent Domain", is paralled by Jahr, section 90, "Value of Property to Other Potential Condemnors as Affecting Market Value." Orgel discusses at length two Supreme Court cases, McGovern v. New York, 229 U. S. 363, and New York v. Sage, 239 U. S. 57. These are the only two cases referred to by Jahr in this section although, between the date of publication of Orgel and the date of publication of Jahr, the United States Supreme Court had decided two cases directly in point: U. S. ex rel. T. V. A. v. Powelson, 319 U. S. 266, and Grand River Dam v. Grand-Hydro, 335 U. S. 359.

Orgel, at page 612, states:

> "Some of the state constitutions, in addition, contain provisions peculiarly applicable to the condemnation of public utilities."

In support of this statement Orgel quotes at length from the California and Ohio constitutions.

Jahr, at page 277, says:

> "Some state constitutions contain special provisions applicable to acquisitions of public utility property * * *."

Jahr's footnote to this statement contains only three words, "California and Ohio" and neither cites nor quotes from any provision of the constitutions of these two states.

As a matter of fact, at the time of the publication of Jahr there were many other constitutional provisions in other states affecting condemnation of public utilities and

corporate franchises. See Va. Const. sec. 125, sec. 159; Colo. Const. art. XV, sec. 8; Mich. Const. 1908, art. VIII, sec. 23; Miss. Const. sec. 190; Mo. Const. of 1945, art. XI, sec. 4; Mont. Const. art. XV, sec. 9; Neb. Const. art. X, sec. 6; So. Dak. Const. art. XVII, sec. 4; see South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co., 8 Cir., 141 Fed. 578; West Va. Const. art. XI, sec. 12; Wyo. Const. art. X, sec. 9, sec. 14.

As the court said in White v. Bender, D. C. N. D. N. Y., 185 Fed. 921, 925:

> "If other cases have been decided on the same points, and the later writer does not give them, it is persuasive evidence of copying."

Finally, there is an instance of a plain common error. Orgel, on pages 89-92, discusses the possible use of hindsight in fixing market value as of a previous date. He concludes that the courts will permit a jury to consider facts discovered after the date of valuation as enhancing the market value. To support this conclusion he discusses and quotes from three cases: City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Tyson Creek R. Co. v. Empire Mill Co., 31 Ida. 580, 174 Pac. 1004; Matter of Board of Water Supply (Coykendall Quarry), 209 App. Div. 231. Jahr at page 110 arrives at the same conclusion, citing exactly the same three cases and no others. Actually, both Orgel and Jahr have made the same error in that City of Los Angeles v. Pomeroy, supra, holds precisely to the contrary.

While the above cited special instances are persuasive of the fact that the individual defendant appropriated the labor of the individual plaintiff in the preparation of his book, the real proof is found in the reading of the two treatises. When the books are read together in continuity the content is so similar in arrangement, in language and

in substance that the conclusion is inescapable that the individual defendant took unfair advantage of his access to the individual's plaintiff's book in the compilation of the part of his work which dealt with valuation.

I thus find that defendants are liable to plaintiffs in damages for infringement of plaintiffs' copyright. Pursuant to stipulation of the parties the question of the amount of damages has been reserved. The issue of damages is hereby referred to Newman Levy, Esq., 52 West 58th Street, as master to hear evidence and to report the amount thereof.

Dated: March 30, 1960.

E. J. Dimock,
*United States District Judge.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

**Report of Special Master**

Hon. Edward J. Dimock
District Judge

SIR:

In your opinion in the above matter, dated March 30, 1960, you stated: "Pursuant to the stipulation the issue of damages is hereby referred to Newman Levy, 52 West 58 Street as master to hear evidence and report the amount thereof."

At a preliminary conference held by me with counsel prior to the first hearing it was agreed by counsel that in addition to taking evidence on the issue of damages I should hear evidence and report to the court as to the value of the professional services of the attorneys for the plaintiffs. Accordingly, this report will include recommendations both as to damages and attorneys' fees.

This is an action for damages for breach of copyright brought by the author and publishers of "Orgel on Valuation Under Eminent Domain" against the author and publishers of Jahr on "Eminent Domain—Valuation and Procedure."

The trial court found that part of the Jahr book had been plagiarized from the Orgel book. The opinion stated:

> "Orgel is an exhaustive treatment of one phase of eminent domain. Jahr purports to cover not only

the phase covered by Orgel Valuation but also the procedure in eminent domain. There is no charge that Jahr infringes Orgel in any respect other than the treatment of valuation."

It was established without dispute that the part alleged to have been plagiarized by Jahr constitutes about thirty-five percent of the Jahr book. (S.M. 285).

The affidavit of Walter Ford, Vice-President of the defenda.... Clark Boardman Co. Ltd., with attached schedules was admitted in evidence as Plaintiffs' Exhibit 1. This exhibit discloses the following:

| | |
|---|---|
| Total number of Jahr book printed | 2500 |
| Total printing expense | $ 6,366.71 |
| Total binding expense | $ 1,815.90 |
| Total sales, July 1953 to May, 1960 | $27,977.91 |

An affidavit of Walter Ford with schedules was admitted in evidence as Defendants' Exhibit A (S.M. 379). This exhibit states:

| | |
|---|---|
| Advertising expense | $6,671.98 |
| Author's royalties | $4,135.20 |

There was a copyright fee of $4.00 which brings the total cost of producing the Jahr book up to $19,000, or a gross profit claimed by defendants of $8,714.12.

It is urged by the plaintiffs that the royalties paid by the defendants Clark Boardman to their co-defendant Jahr are not a part of the cost of producing the book and are not properly deductible. With this contention I agree and therefore disallow the defendants' claim to deduct the royalties as an item of expense. I find, therefore, that the profit realized by the defendants from the Jahr book is $12,849.32.

The plaintiffs claim that since their book was plagiarized

they are entitled to all these profits. The defendants contend that, since only thirty-five percent of their book contains plagiarized material, these profits should be apportioned.

The rule by which this question of apportionment of profits is to be determined is found in the Copyright Law of the United States, Title 17, U. S. C., Section 101 (b), which reads:

> "*Damages and Profits; Amount; Other Remedies:*—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just."

The question of apportionment of profits has been passed upon in many cases involving, for the most part, plays and motion pictures. The book cases are relatively few. The difficulty of apportionment has been recognized by the courts. In *Woolworth* vs. *Contemporary Arts*, 344 U. S. 228, Mr. Justice Jackson said (p. 232):

> "Few bodies of law would be more difficult to reduce to a short and simple formula than that which determines the measure of damages for actionable wrongs. The necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by exercise of the wide judicial discretion within limited amounts conferred by this statute."

The courts have made a distinction between book cases and play and motion picture cases. The rationale is stated succinctly in *Plagiarism and Originality* by Alexander Linden, Harpers 1952, at p. 165:

> "It should be noted at this point that there is a difference between plagiarism via a book and plagiarism via a play or a movie. The sole creative agency in a book is the author. In a play or a movie, the story is but one element, however important; the finished product is the combined effort of a number of individuals: director, actors, scenic artist, designer . . ." etc.

In *Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 309 U. S. 390, the court said, (Hughes, Ch. J.) at p. 407:

> "The testimony showed quite clearly that in the creation of profits from the exhibition of a motion picture, the talent and popularity of the 'motion picture stars' generally constitutes the main drawing power of the picture . . . In addition to the drawing power of the 'motion picture stars' other factors in creating the profits were found in the artistic conceptions and in the expert supervision and direction of the various processes which made possible the composite result with its attractiveness to the public."

It seems to me, therefore, that the play and motion picture cases cited by counsel in their briefs to me do not furnish a sound, guiding rule in the instant case. As Linden says (supra) "The sole creative agency in a book is the author."

The plaintiffs rely upon *Callaghan* v. *Meyer*, 128 U. S. 617 for the proposition that where the plagiarized portion is inseparable from the unplagarized portion "it is

the defendants who are responsible for having blended the lawful with the unlawful and they must abide the consequences . . . In such a case . . . the owner of the copyright will be entitled to recover the entire profits on the sale of the book . . ."

Unfortunately for this contention, the plagiarized and unplagiarized parts in the instant case *are* separable. Judge Dimock found that "there is no charge that Jahr infringes Orgel in any respect other than the treatment of valuation." Thirty-five percent of the Jahr book is conceded to be taken from the Orgel book. Therefore, for the purpose of this case, sixty-five percent of the Jahr book may be deemed to be original.

It therefore seems to me that the profits on the Jahr book should be apportioned. Since these profits have been shown to be $12,849.32 I recommend that thirty-five percent thereof, or $4,497.27 be awarded to the plaintiffs.

However, this sum does not seem to me to be adequate compensation to the plaintiffs for the wrong done to them. Although only part of Jahr contains material taken from Orgel, it is apparent that the effect of the plagiarism was to destroy the commercial value of Orgel. In *F. W. Woolworth* v. *Contemporary Arts*, 193 F. 2d 162, 167, the court said:

> "Damages are awarded to a copyright proprietor on the conventional legal principle of affording compensation in money for the harm inflicted upon him by the wrongful act of the infringer, whereas an infringer's profits from his wrongful act are awarded to the copyright proprietor, not to inflict punishment on the infringer, but as an appropriate equitable relief incident to a decree of injunction in order to prevent the infringer's unjust enrichment."

I have not read either of the books in this case, but I am informed, and I have no reason to doubt, that Orgel is a scholarly and original contribution to the literature on the subject of valuation. The damage done to the book by the plagiarism cannot be adequately measured by prorating the profits of the Jahr book.

Nor is it susceptible to proof that the purchasers who bought the Jahr book bought it because of the plagiarized material. It is true that if there had been no Jahr book a person wanting to know about valuation in eminent domain would have had to go to the Orgel book. But Jahr contains much more—sixty-five percent more—than the treatment of valuation. It contains a presentation of practice and procedure in eminent domain, and forms. It is impossible to say why purchasers bought Jahr, or whether they would have bought Orgel if Jahr had not been published.

In the *Sheldon* case, supra, Chief Justice Hughes said, p. 399:

> "Petitioners stress the provision for recovery of 'all' the profits, but this is plainly qualified by the words 'which the infringer shall have made from such infringement'. This provision in purpose is cognate to that for the recovery of 'such damages as the copyright proprietor may have suffered due to the infringement.' The purpose is thus to provide just compensation for the wrong, not to impose a penalty by giving to the copyright proprietor profits which are not attributable to the infringement."

I find therefore that the plaintiffs should be awarded "as appropriate equitable relief" something beyond their share of the profits "to provide just compensation for the wrong." The amount is difficult to arrive at and cannot

be ascertained with mathematical precision. Having given the matter much thought, and bearing in mind Judge Learned Hand's statement in *Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 100 F. 2nd 45, 51, "It is not our best guess that must prevail but a figure which will favor the plaintiffs in every reasonable chance of error", I recommend that "as appropriate equitable relief" the plaintiffs be awarded an additional sum of $7,000, making a total of $11,497.27.

The plaintiffs offered testimony as to the loss of future sales as a result of the publication of Jahr's book. Mr. Lewis of the Michie Company testified (S.M. 344) that if it had not been for the publication of Jahr a total of 1950 copies of Orgel would have been sold at $14.34 per set, which would have made a profit of $27,963.

I allowed this testimony although I stated (S.M. 2970299) that I doubted its relevancy. I am still of the same opinion, but aside from its relevancy I consider it speculative and conjectural and lacking in probative force. I therefore recommend that plaintiffs' claim for $27,963. be disallowed.

The plaintiffs called the defendant Jahr (S.M. 274) and made the following offer of proof (S.M. 275):

> "MR. BIRDSALL: I expect to prove that this witness . . . as part of the fruits of the piracy . . . aggrandized himself and placed himself in the position where his income substantially increased as an attorney and from other sources, as a result that these are profits which flowed to him from his illegal act in exappropriating the plaintiffs' book."

No authorities were presented to me in support of this offer, and, since it appeared to me to be clearly inadmissible, and not a proper element of damage in this case, I excluded the testimony. (S.M. 275)

## Counsel Fees

17 U.S.C.A. §116 states that it is discretionary with the court to award "a reasonable attorney's fee" as part of the costs. I recommend to the court that such fee be awarded to the attorneys for the plaintiffs.

The criteria for determining the amount of the fee are stated as follows in *In Re Osofsky*, 50 F. 2nd 925:

(1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary.

(2) The quality of skill which the situation facing the attorney demanded.

(3) The skill employed in meeting that situation.

(4) The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer.

(5) The result of the case, because that determines the real benefit to the client.

(6) The eminence of the lawyer at the bar, or in the specialty in which he may be practising.

James E. Birdsall, Esq., counsel for the plaintiffs testified to his professional experience and the work done by his firm in this case. He testified that the fair and reasonable value of his services is $25,000. (S.M. 145 et seq.)

The plaintiffs called Julian T. Abeles, Esq., as an expert. (S.M. 300 et seq.) Mr. Abeles testified to his long and extensive experience in the field of plagiarism and copyright law, and his qualfications as an expert were virtually conceded by the defense. (S.M. 339-340.) The witness testified that in his opinion the fair and reasonable value of the services rendered by Mr. Birdsall and his firm was $25,000.

The following facts were established to my complete satisfaction, both by the evidence and by my personal observation. I find that Mr. Birdsall and his firm are highly reputable and respected members of the bar. This case was prepared by the plaintiffs with commendable thoroughness. It was fought with zeal and devotion and professional expertness.

Mr. Birdsall testified that approximately 1500 hours were spent by his firm on this case; sixty percent of that time, approximately 900 hours, were spent by himself and his partner, Mr. Warner, (S.M. 163). It was the practice of his firm, he said, to charge $75 an hour for the time of the senior partners. This would amount to $67,500 for 900 hours. In the present case he fixed his fee at approximately $12.50 an hour.

In considering the amount of time spent by Mr. Birdsall and his firm on this case I call attention to the following: (S.M. 175):

> "Q. May I ask how many cases you have tried in copyright?
>
> A. One.
>
> Q. What case was that?
>
> A. The instant case.
>
> Q. The instant case?
>
> A. Yes.
>
> Q. May I suggest that a specialist, or a man knowing the field, might have spent less time?
>
> A. Yes, you may suggest it.
>
> Q. Would you accept that suggestion?
>
> A. Yes."

Counsel on both sides were very helpful in submitting memoranda of law on the question of attorneys' fees. I have read the cases carefully, and although they are use-

ful in stating general principles I find them of questionable aid in passing upon the always vexatious problem of fixing the value of a lawyer's services in a particular case.

Bearing in mind the criteria in *In Re Osofsky*, (supra) I find that the Birdsall firm spent a great deal of time on this case; it was handled expertly, and prosecuted to a successful conclusion. I have given due consideration to the expert testimony of Mr. Abeles, having in mind cases in my own practice in which eminent experts have been called to give opinion as to the value of legal services.

In the final analysis I have drawn upon my own experience at the New York bar for more than forty-eight years, during which time I have, along and in association with many other experienced lawyers, wrestled with the troublesome problem of fee fixing.

It is my considered opinion that the sum of Ten Thousand dollars ($10,000) would be a fair fee for plaintiffs' attorneys in this case and I so recommend to the Court.

## Conclusion

I respectfully recommend to the court:

(1) That an award of damages be made to the plaintiffs in this case in the sum of $11,497.27; and

(2) That a fee for professional services be allowed to the attorneys for the plaintiffs in the sum of $10,000.

Respectfully submitted,

s/ NEWMAN LEVY
SPECIAL MASTER

## Memorandum of Dimock, D. J.

(Record, pages 558-561)

### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

DIMOCK, D. J.:

Both plaintiffs and defendants have filed objections to the report of the master appointed herein to hear evidence on the issue of damages in this copyright case and report the amount thereof.

By a memorandum filed March 30, 1960, I found that defendants were liable to plaintiffs for infringement of plaintiffs' "Orgel on Valuation Under Eminent Domain" by the publication of defendants Jahr on "Eminent Domain—Valuation and Procedure".

The master has reported that plaintiffs are entitled to the sum of $11,497.27 and counsel fees of $10,000.

The sum of $11,497.27 is made up of 35% of defendants' total net profits of $12,849.32 or $4,497.27 plus $7,000. The addition of $7,000 was made on the ground that plaintiffs were entitled to something more than 35% of defendants' profits "to provide just compensation for the wrong".

The first matter to be considered is plaintiffs' contention that their recovery of profits ought not to be limited to 35% of those earned. The estimate of 35% is based on the fact that 35% of the pages in Jahr are devoted to valuation and that there is no claim that any of the rest was obtained from Orgel. Such a rule of thumb will not do. No evidence that was introduced can serve as a basis

for determining how much of defendants' profits resulted from the plagiarism. For ought that appears the legitimate 65% of the pages in Jahr may have been completely without influence in the sales. Under those circumstances plaintiffs are entitled to all of defendants' profits. Sammons v. Larkin, D. C. D. Mass., 38 F. Supp. 649.

Plaintiffs contend that their damages exceeded defendants' profits even when taken in full. They cite the testimony of an expert that they were deprived of sales of 1950 copies of Orgel by the competition of Jahr and that their profits on the frustrated sales would have been $27,963. The master properly rejected this testimony as speculative. It actually amounted to nothing more than that every sale of Jahr to a purchaser who did not already have a copy of Orgel would have gone to Orgel if Jahr had not been on the market. Plaintiffs have no more right to a presumption that the legitimate content of Jahr was not a sales factor than defendants had to a presumption that it was a 65% sales factor.

The master properly rejected testimony that the individual defendant by appropriating the individual plaintiffs' work, placed himself in a position where his income from law practice and other sources increased and the conclusion that such additional income constituted profits recoverable by plaintiff. The subject is too remote and speculative to be susceptible of computation by a court except as part of the award of from $250 to $5,000 which may be made "in lieu of actual damages and profits" under section 101(b) of title 17 U. S. code.

Defendants object to the master's allowance of a round sum of $7,000 in addition to defendants' profits "to provide just compensation for the wrong." The rule is that the successful plaintiff in a copyright infringement action can recover his damages or defendant's profits, whichever is higher. Sheldon v. Metro-Goldwyn Pictures Corp., 309

U. S. 390, 400-401. I understand that the master found that plaintiffs' damages exceeded by $7,000 the allowable $4,497.27 of defendants' profits which he allowed. I do not understand, however, that he would have found that they exceeded by $7,000 the amount of $12,849.32 which I am awarding so I disregard the master's allowance of $7,000.

Plaintiffs will thus be awarded $12,849.32 as defendants' profits.

Plaintiffs object to the master's recommendation of counsel fees of $10,000 as inadequate. While the number of hours spent on the case was great, the presentation excellent and the result successful, I cannot shut my eyes to the fact that counsel were dealing with an unfamiliar subject and cannot fairly charge defendants for their education.

This memorandum is entitled to embody findings of fact and conclusions of law including findings and conclusions adapting all of the recommendations of the master except those fixing the amount of the recoverable profits at $4,497.27 and recommending that $7,000 be added to provide just compensation for the wrong.

Plaintiffs are entitled to costs as of course.

The usual injunction will issue.

Settle judgment on notice.

Dated: November 29, 1960.

E. J. Dimock,
*United States District Judge.*

## Judgment

(Record, pages 573-576)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. Action File No. 92-2

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[SAME TITLE]

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This cause having duly come on for trial before the Honorable Edward J. Dimock, United States District Judge for the Southern District of New York, on the 25th, 26th and 29th days of February, and the 1st day of March, 1960, and proof having been presented on behalf of the respective parties; and the plaintiffs having appeared by Warner, Birdsall & Anfuso, Esqs., James E. Birdsall, Esq., of counsel; and the defendants having appeared by Wittenberg, Carrington & Farnsworth, Esqs., Philip Wittenberg, Esq., of counsel; and the Court being fully advised in the premises; and an opinion dated March 30th, 1960 having been rendered by the Court, finding that the defendants are liable to the plaintiffs for damages for infringement of the plaintiffs' copyright, and directing that the issue of damages be referred to Newman Levy, Esq., of 52 West 58th Street, New York, New York, as Master, to hear evidence and report the amount thereof; and said matter having duly come on to be heard before the said Master on May 4th, May 25th, June 10th and June 13th, 1960; and the Master having filed his Report on July 14, 1960; and the plaintiffs having filed objections to the Master's Report on July 26th, 1960; and the defendants having filed objections to the Master's Report on August 1st, 1960; and the plaintiffs having filed

notice of motion for a hearing on the objections to the Master's Report; and the Court having heard argument with respect thereto, and by its memorandum decision dated November 29th, 1960 having embodied the findings of fact and conclusions of law in the Master's report, adopting all of the recommendations of the Master, except as modified therein, and having directed that the plaintiffs are entitled to costs as of course and an injunction should issue; it is hereby

ORDERED, ADJUDGED AND DECREED: (1) That the plaintiff Lewis Orgel is the owner of and obtained good, valid and subsisting copyright with regard to the book entitled "Valuation Under the Laws of Eminent Domain"; and (2) that both of the defendants have infringed upon and violated the plaintiffs' said copyright and plaintiffs' rights thereunder by publishing and placing upon the market a book entitled Jahr, "Eminent Domain, Valuation and Procedure", which was copied largely from plaintiff Lewis Orgel's copyrighted book entitled "Valuation, Under the Laws of Eminent Domain", and that said infringement has continued from the time of trial and to date notwithstanding due notice to both defendants and institution of this suit; and (3) that the defendants and each of them, their officers, agents, attorneys, servants and employees, and all acting by, through, under or in concert with them in any manner whatsoever, whether directly or indirectly, be and they hereby are perpetually restrained and enjoined from in any manner or form, directly or indirectly, publishing, marketing, selling or otherwise disposing of any copies of the book entitled Jahr, "Eminent Domain, Valuation and Procedure", or in any other way infringing upon plaintiff's said copyright; and (4) that the defendants and each of them deliver upon oath for destruction, on or before the 30th day of December, 1960,

to the clerk of the United States District Court for the Southern District of New York, at his office, in the United States Courthouse, Foley Square, New York, New York, all of the infringing books entitled Jahr, "Eminent Domain, Valuation and Procedure" now in their possession or control and any and all plates used or that might be used by them for the publication of said infringing book; and (5) that the Report of the Master is hereby confirmed in all respects, except to the extent that said Report fixes the amount of the recoverable profits at $4,497.27 and to the extent that it recommends that $7,000.00 be added to provide just compensation for the wrong; and (6) that the plaintiffs recover from the defendants, jointly and severally, as joint tort feasors, damages and profits in the sum of $12,849.32, and also attorneys' fees for the services of plaintiffs' attorneys in the cause in the sum of $10,000.00; and (7) that $1,250.00 the allowance of the Master and the cost of said reference herein be charged against and borne as costs of the action by the defendants, jointly and severally; and (8) that the plaintiffs recover from the defendants their costs and disbursements in this suit, to be taxed by the Clerk of this Court; and (9) that any and all purported copyrights heretofore obtained or applied for by defendants for the book entitled Jahr "Eminent Domain, Valuation and Procedure" are hereby adjudged to be null, void and of no effect; and (10) that plaintiffs recover of the defendants a judgment in the sum of $22,849.32, together with the costs to be taxed by the Clerk of this Court; and it is hereby

ORDERED, that execution of or any proceedings to enforce this judgment be and the same hereby is stayed pending the filing of an appeal upon the furnishing of a

bond in the amount of $30,000.00 within ten (10) days from the entry of this judgment.

Dated: New York, New York.
December 19th, 1960.

E. J. DIMOCK.
*United States District Judge.*

Judgment entered 12/19/60.

HERBERT A. CHARLSON,
Clerk.
Dec. 19, 1960:

On Dec. 13, 1960 costs were taxed in the sum of $926.40 and on Dec. 19, 1960 the Court allowed the Master the sum of $1,250.00 making a total cost of $2,176.40.

HERBERT A. CHARLSON,
Clerk.

# UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 120 September Term, 1961.

(Argued December 5, 1961 Decided March 27, 1962.)

Docket No. 26818

[SAME TITLE]

Before:

WATERMAN, SMITH and MARSHALL,
*Circuit Judges.*

Appeal by defendants from award of injunctive relief, damages, attorney's fees and costs in action for copyright infringement in the District Court for the Southern District of New York, Edward J. Dimock, *District Judge*. Modified as to damages and attorney's fees, and as modified affirmed.

JAMES E. BIRDSALL, New York, N. Y. (Warner, Birdsall & Anfuso, New York, N. Y., on the brief), *for plaintiffs-appellees.*

PHILIP WITTENBERG, New York, N. Y. (Lemuel Bannister, Jr., and Wittenberg, Carrington & Farnsworth, New York, N. Y., on the brief), *for defendants-appellants.*

SMITH, *Circuit Judge:*

This is an appeal by the defendants from a judgment for the plaintiffs in the District Court for the Southe

District of New York tried to the court without a jury. Edward J. Dimock, *D.J.*, in a suit for damages and injunction for copyright infringement brought pursuant to the Copyright Act, 17 U. S. C. Sec. 1 et seq., sec. 101.

On March 30, 1960 an interlocutory judgment in favor of the plaintiffs, finding infringement, was rendered and the issue of damages and counsel fees referred to Newman Levy, Esq., a Special Master. A report was filed July 14, 1960 by the Special Master awarding to the plaintiffs thirty-five percent (35%) of the profits earned by the defendants, amounting to $4,497.27, plus an additional sum of $7,000 based on the damages of the plaintiffs having exceeded by this amount the profits recovered, together with counsel fees of $10,000.

Judge Dimock on the motion to confirm the report held that the Master had improperly made an allocation of profits as no evidence had been offered to show that any portion of the profit was due to that part of the book not appropriated from Orgel. Plaintiffs were therefore allowed the full amount of the profits earned by the defendants, $12,849.32, and the Master's additional award of $7,000 was stricken. The district court also confirmed the award of counsel fees, $10,000, and allowed $1,250 for the Master thereby making the total costs $2,176.40, and granted the usual injunctive relief. We modify the monetary judgment to reduce the award to 50% of the profits, $5,000 counsel fee, and costs, and as modified affirm the judgment.

We agree with the conclusion of the district court that:

> "When the books are read together in continuity the content is so similar in arrangement, in the language and in substance that the conclusion is inescapable that the individual defendant took advantage of his access to the individual's plaintiff's [sic] book in the

compilation of the part of his work which dealt with valuation." Opinion of Dimock, *D.J.*, S. D. N. Y., March 30, 1960.

Although Jahr has in some instances brought Orgel up to date, for instance he included *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945), and has added or substituted in a number of places recent New York condemnation cases, it appears to this court that the essence of Orgel was "lifted" by Jahr, and while he did not confine himself entirely to Orgel he did adopt as his own, Orgel's analysis, organization of material, phrasing and citations without any credit to Orgel as to most of the portions appropriated.

While any two books treating the same subject, particularly in the field of law where words and phrases are often terms of art, and based upon common sources are bound to contain a large measure of innocent similarity[1] we think the portion of Jahr's book dealing with valuation is so strikingly similar to plaintiff Orgel's work that even the most undiscriminating reader would be forced to conclude that defendant Jahr did little more than edit and bring up to date plaintiff Orgel's work. Defendant's book is merely a "colorable variation." *Edward Thompson Co.* v. *American Law Book Co.*, 176 F. Rep. 922, 923 (2 Cir. 1903), of Orgel's. Appropriation of the fruits of another's labor and skill in order to publish a rival work without the expenditure of the time and effort required for independently arrived at results is copyright infringement.[2]

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1. See *Chautauqua School* v. *National School of Nursing*, 238 F. Rep. 151 (2 Cir. 1956); *Edward Thompson Co.* v. *American Law Book Co.*, 122 F. Rep. 922 (2 Cir. 1903); *Greenbie* v. *Noble*, 151 F. Supp. 45, 67 (S. D. N. Y. 1957); Ball, Law of Copyright and Literary Property, 308.

2. *West Publishing Co.* v. *Edward Thompson Co.*, 176 F. Rep. 833, 838 (2 Cir. 1910); 34 Am. Jur. Literary Property and Copyright 387.

Appellants attack the decision of the court below, claiming the award of all defendants' profits to the plaintiffs was contrary to law as it was conceded that only thirty-five percent of Jahr's book dealt with the law of valuation of eminent domain and no claim was made that the remaining sixty-five percent was connected with Orgel's book.

While we appreciate the fact that defendants have failed to show with any certainty the portion of the sales attributable to the plagiarized portion we cannot agree with the conclusion of the district court that therefore all of the profits should be awarded to the plaintiffs.

In cases such as this where an infringer's profits are not entirely due to the infringement, and the evidence suggests some division which may rationally be used as a springboard it is the duty of the court to make some apportionment.

> "We are aware that out of all this no real standard emerges, and that it would be absurd to treat the estimates of experts as being more than expressions of very decided opinions that the play should count for very little. But we are resolved to avoid the one certainly unjust course of giving to the plaintiffs everything, because the defendants cannot with certainty compute their own share. In cases where plaintiffs fail to prove their damages exactly, we often make the best estimate we can, even though it is really no more than a guess (Pieczonka v. Pullman Co., 2 Cir., 102 F. 2d 432, 434), and under the guise of resolving all doubts against the defendants we will not deny the one fact that stands undoubted. Procedural duties are devised in aid of truth; and their unsparing use may defeat their whole purpose, as here it would. However, though we do not press

the burden of proof so far, the defendants must be content to accept much of the embarrassment resulting from mingling the plaintiffs' property with their own. We will not accept the experts' testimony at its face value; we must make an award which by no possibility shall be too small. It is not our best guess that must prevail, but a figure that will favor the plaintiffs in every reasonable chance of error." *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 45, 51 (2 Cir. 1939) (Learned Hand, *J.*), affirmed 309 U. S. 390 (1940). Contra, *Sammons* v. *Larkin*, 38 Fed. Supp. 649 (D. Mass. 1940).

*Belford* v. *Scribner*, 144 U. S. 488 (1892) and *Callaghan* v. *Myers*, 128 U. S. 617 (1888) have been narrowly limited and have no application "where it is clear that all the profits are not due to the use of the copyrighted material, and the evidence is sufficient to provide a fair basis of division." *Sheldon* v. *Metro-Goldwyn Corp.*, 309 U. S. 390, 402 (1940). *Alfred Bell & Co.* v. *Catalda Fine Arts*, 86 F. Supp. 399 (S. D. N. Y. 1949), affirmed 191 F. 2d 99 (2 Cir. 1951), is another case where no division was feasible as the entire product was the result of unlawful appropriation.

In the instant case the plagiarized material appeared only in the section on Valuation, which comprises thirty-five percent of Jahr's work. The very existence of the remaining sixty-five percent in the infringing work is convincing evidence that some part of the commercial value of the whole is attributable thereto. We are not persuaded that the principle of apportionment, announced in *Sheldon*, must be limited to cases in which experts have testified with respect to the relative contributions of the plagiarized and original portions. Although the testimony of experts is often helpful it is at best little more

than an educated guess, and not of such compelling force that it is an essential element in every case.

In arriving at a figure every indulgence should be granted plaintiff in an attempt to arrive at a sum which is assuredly adequate. However, a lump sum addition such as that adopted by the Special Master is not the proper approach to the case at bar.

No method will give mathematical accuracy, but in dealing with material such as we have here, designed primarily for use by bench and bar in legal contest, a reasonable estimate of the relative contribution of the plagiarized material may be made on the record before us.

Since valuation is the single most important issue in the bulk of condemnation litigation, we feel that it is reasonable to allocate 50% of the profits to the infringing material, although that makes up but approximately 35% of the defendants' complete work. The treatment of the nature and exercise of the power of eminent domain, parties, pleadings, jurisdiction and venue, methods of trial and review, and the sample forms provided, while useful and in some cases important are, after all, ancillary to the central issue in the vast majority of condemnation actions, that of valuation. Jahr, however, did undoubtedly perform a useful service in bringing these subjects together and treating them in one volume. We think the practitioners in this field would find the balance of the work needed and useful in approximately the same degree as the single most important portion, that on valuation derived from Orgel. This establishes the award at $6,424.66. Costs, including the Master's fee, were properly allowed. 17 U. S. C., §116. *Marks Music* v. *Foullon*, 171 F. 2d 905 (2 Cir. 1949). *Copyright Law Revision Studies* prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary,

pursuant to S. Res. 240, Eighty-sixth Congress, Second Session, pp. 29, 30. The award of attorney's fees is discretionary with the court under the act. *Ibid.* p. 31. Since such a provision for attorney's fees is at variance with the usual practice in litigation before our courts, however, it has been sparingly used and the amounts awarded modest. *Ibid.* pp. 85, 91 Table B, Fee Awards to Prevailing Plaintiffs, 1938-1957. In the case at bar, while a substantial amount of time was spent by plaintiffs' counsel, much of it was necessitated by counsel's unfamiliarity with the field. Considering, as we must, the amount of work necessary, the amount of work done, the skill employed, the monetary amount involved and the result achieved, we feel that $10,000 is more than a liberal allowance and order the amount of attorney's fees reduced to $5,000.

The judgment is ordered modified in accordance with this opinion and as modified is affirmed. Costs, including attorney's fees of $250, to plaintiffs on this appeal.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of March, one thousand nine hundred and sixty-two.

Present:

HON. STERRY R. WATERMAN,

HON. J. JOSEPH SMITH,

HON. THURGOOD MARSHALL,

Circuit Judges.

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[SAME TITLE]

---

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is modified, with costs, including attorney's fees of $250.00, to the ap-

pellees and as modified said judgment be and it hereby is affirmed in accordance with the opinion of this Court.

A. DANIEL FUSARO
*Clerk*

*United States Court of Appeals*

Second Circuit

Filed Mar. 27, 1962

A. DANIEL FUSARO,
*Clerk*

Office-Supreme Court, U.S.
FILED
JUL 11 1962
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1961**

**No. [redacted] 179**

LEWIS ORGEL and THE MICHIE COMPANY,

*Petitioners,*

against

CLARK BOARDMAN CO. LTD. and ALFRED D. JAHR,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PHILIP WITTENBERG
EDWARD W. STITT, JR.
*Counsel for Respondents*
70 West 40th Street
New York 18, N.Y.

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1961**

**No. 1039**

LEWIS OEGEL and THE MICHIE COMPANY,

*Petitioners,*

—against—

CLARK BOARDMAN CO. LTD. and ALFRED D. JAHR,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### Statement

The respondents oppose the granting of a writ of certiorari upon the ground that the petition fails to show any grounds therefor as specified in Rule 19 (b) of the Rules of the Supreme Court, and upon the further ground that the matter both of the allocation of profits and the allowance of counsel fees were within the sound judicial discretion of the Court of Appeals for the Second Circuit.

This action was a suit for damages and an injunction for infringement of copyright, which was brought pursuant to The Copyright Act, Title 17 U.S.C.

The plaintiff's book was entitled ORGEL ON VALUATION UNDER EMINENT DOMAIN.

The defendants' book was entitled EMINENT DOMAIN—VALUATION AND PROCEDURE—Alfred D. Jahr. Trial was before the Court (Dimock, *D.J.*) without a jury. An interlocutory judgment was rendered on March 30, 1960 in favor of the plaintiffs. The issue of damages was referred to Newman Levy, Esq. to hear evidence and to report the amount thereof. The Master filed a Report on the 14th day of July, 1960. Thereafter objections were filed to the said Report. The final judgment was entered on the 19th day of December, 1960 and in addition to an injunction awarded to the plaintiffs against the defendants jointly and severally the sum of $12,849.32, being the total of profits and royalties of the defendants; an additional sum of $10,000 as counsel fees; costs were taxed in the sum of $926.40. The Court allowed the Master a sum of $1,250. making the total costs $2,176.40 and the total judgment in the sum of $25,025.72.

The defendants appealed to the Court of Appeals for the Second Circuit which modified unanimously the judgment in the following particulars:

1. The Court of Appeals apportioned the profits in accordance with the relative contribution of the plagiarized material to the total work and allocated fifty percent of the profits instead of the one hundred percent allowed by the trial court; and

2. The Court reduced the amount of attorneys' fees from $10,000. to $5,000, and as so modified the Court below affirmed the judgment of the District Court.

## POINT I

**The Court below in the exercise of sound judicial discretion awarded fifty percent of the profits to the plaintiff. This presents no consideration requiring review under Rule 19 (b).**

The statute by which this question of apportionment of profits is to be determined is found in the Copyright Law of the United States, Title 17 U.S.C., Section 101 (b).

The cases relied upon by the plaintiff *Callaghan* v. *Myers*, 128 U.S. 617 and *Belford, Clarke & Co.* v. *Scribner*, 144 U. S. 488 (pp. 9, 10 and 11 Petition) both arose under the Copyright Act of July 8th, 1870, prior to the Copyright Act of 1909 now in force substantially.

In *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, this Court considered both *Callaghan* and *Belford* and distinguished them at length. This Court said:

> "We agree with petitioners that the 'in lieu' clause is not applicable here, as the profits have been proved and the *only question is as to their apportionment.*
>
> Petitioners stress the provision for recovery of 'all' the profits, but this is plainly qualified by the words 'which the infringer shall have made from such infringement.' This provision in purpose is cognate to that for the recovery of 'such damages as the copyright proprietor may have

suffered due to the infringement.' The purpose is thus to provide just compensation for the wrong, not to impose a penalty by giving to the copyright proprietor profits which are not attributable to the infringement.

Prior to the Copyright Act of 1909, there had been no statutory provision for the recovery of profits, * * *." (Emphasis supplied) (P. 399)

This Court then went on to say that in passing the Copyright Act the apparent intention of Congress was to assimilate the remedy with respect to the recovery of profits to that already recognized in patent causes and said:

"We shall presently consider the doctrine which has been established upon equitable principles with respect to the apportionment of profits in cases of patent infringement. We now observe that there is nothing in the Copyright Act which precludes the application of a similar doctrine, based upon the same equitable principles in cases of copyright infringement." (p. 401)

Following this the Court discussed at length *Callaghan* and *Belford* and said:

"We agree with the court below that these cases do not decide that no apportionment of profits can be had where it is clear that all the profits are not due to the use of the copyrighted material, and the evidence is sufficient to provide a fair basis of division so as to give to the copyright proprietor all the profits that can be deemed to have resulted from the use of what belonged to him. Both the Copyright Act and

> our decisions leave the matter to the appropriate exercise of the equity jurisdiction upon an accounting to determine the profits 'which the infringer shall have made from such infringement.' " (p. 402)
>
> * * * * *
>
> "The result to be accomplished 'is a rational separation of the net profits so that neither party may have what rightfully belongs to the other.' Id. 235 U.S. p. 647, 59 L. ed. 403, 35 S. Ct. 223.
>
> We see no reason why these principles should not be applied in copyright cases." (p. 404)

In citing *Callaghan* and *Belford* the petitioners here commit grave error.

The petitioners then cite *Sammons* v. *Larkin*, 38 Fed. Supp. 649, in the District Court of Massachusetts, and conclude following that citation:

> "Clearly, therefore, there is a conflict between the decision reached by the Court of Appeals with reference to the allocation of profits and the decisions of this Court." (Petition p. 11)

This statement by petitioner is utterly without foundation. There was no such conflict.

As to the basis of apportionment the Trial Court in its opinion, referring the computation to the Master, had stated that such copying as occurred was "in the compilation of the part of his work which dealt with valuation". The opinion further stated:

> "Orgel is an exhaustive treatment of one phase of eminent domain. Jahr purports to cover not only the phase covered by Orgel—Valuation—

but also the procedure in eminent domain. There is no charge that Jahr infringes Orgel in any respect other than the treatment of valuation." (pp. 44-45 Petition)

And the Special Master's Report followed with a statement that:

"It was established without dispute that the part alleged to have been plagiarized by Jahr constitutes about thirty-five percent of the Jahr book. (S.M. 285)." (Petition p. 45)

The Master further found with regard to the contention of the plaintiff that he was entitled to the entire profits:

"Unfortunately for this contention, the plagiarized and unplagiarized parts in the instant case *are* separable. Judge Dimock found that 'there is no charge that Jahr infringes Orgel in any respect other than the treatment of valuation.' Thirty-five percent of the Jahr book is conceded to be taken from the Orgel book. Therefore, for the purpose of this case, sixty-five percent of the Jahr book may be deemed to be original." (Petition p. 48)

Rule 53 (e) (2) of the Rules of Civil Procedure provides:

"In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."

In this case the Master had taken some 389 pages of testimony and had received in evidence some 16 exhibits. The District Court nevertheless refused

to follow the rule and the Report of the Master and allowed the total net profits. In so doing the court disregarded the record which showed that the defendant's work:

> "* * * contains much more—sixty-five percent more—than the treatment of valuation. It contains a presentation of practice and procedure in eminent domain, and forms." (Record p. 542)

and the record before the Master, at which the plaintiff testified:

> "Q. Can you tell us roughly what percentage of the defendant's book deals with the subject of the law of valuation of eminent domain? A. About 35 percent." (S.M.P. 27)

Counsel for the plaintiff asserted (S.M.P. 42):

> "We only quoted 35 per cent or a certain portion with respect to valuation that is infringed. I think the question of number of cases should be limited to that particular question."

And again counsel for the plaintiff on his redirect examination of the plaintiff asked:

> "Q. Now, you were asked on cross-examination for a reference to a number of cases in this particular 35 percent of Jahr, referring to and claiming that it was copied from your book——
>
> The Court: Will you speak a little louder, Mr. Birdsall?
>
> Q. A number of cases appearing in that particular 35 percent as compared with the number of cases appearing in your sections on 'Valuation'." (S.M.P. 187)

On the trial counsel for the plaintiff objected to testimony dealing with other particulars of the book asserting that evidence should be admitted relating only to that portion of the book which was claimed to infringe plaintiff's book. In dealing with this the Court of Appeals said:

> "In cases such as this where an infringer's profits are not entirely due to the infringement, and the evidence suggests some division which may rationally be used as a springboard it is the duty of the court to make some apportionment." (Petition p. 64)

And the Court then pointed out that *Sheldon* had narrowly limited *Belford* and *Callaghan*, and that those decisions have no application "where it is clear that all the profits are not due to the use of the copyrighted material, and the evidence is sufficient to provide a fair basis of division."

The Court of Appeals further said:

> "In the instant case the plagiarized material appeared only in the section on Valuation, which comprises thirty-five percent of Jahr's work. The very existence of the remaining sixty-five percent in the infringing work is convincing evidence that some part of the commercial value of the whole is attributable thereto. We are not persuaded that the principle of apportionment, announced in Sheldon, must be limited to cases in which experts have testified with respect to the relative contributions of the plagiarized and original portions. Although the testimony of experts is often helpful it is at best little more than an educated guess, and not of such con-

pelling force that it is an essential element in every case.

* * * * *

Since valuation is the single most important issue in the bulk of condemnation litigation, we feel that it is reasonable to allocate 50% of the profits to the infringing material, although that makes up but approximately 35% of the defendants' complete work. The treatment of the nature and exercise of the power of eminent domain, parties, pleadings, jurisdiction and venue, methods of trial and review, and the sample forms provided, while useful and in some cases important are, after all, ancillary to the central issue in the vast majority of condemnation actions, that of valuation. Jahr, however, did undoubtedly perform a useful service in bringing these subjects together and treating them in one volume. We think the practitioners in this field would find the balance of the work needed and useful in approximately the same degree as the single most important portion, that on valuation derived from Orgel." (Petition pp. 65, 66)

There is no consideration requiring review under Rule 19 (b). There is neither a conflict with another Court of Appeals, nor has there been decided an important question of federal law which has not been settled by this Court. This case is clearly within *Sheldon*. The first question presented by the petitioners (Petition p. 6) clearly requires a negative answer.

## POINT II

**The Court of Appeals properly modified the sum allowed as counsel fee. There is no conflict of decision under Rule 19 (b).**

Again an examination of authorities cited by the petitioners reveals a woeful lack of responsibility in that the authorities cited are irrelevant and not germane.

The case cited as being a specific holding of the Court of Appeals for the Second Circuit limiting its jurisdiction over allowances for counsel in copyright cases, *Hendricks* v. *Thomas Publishing Co.*, 242 Fed. 37, was decided in April 1917. Since that time the court has said in *Hartfield* v. *Peterson*, 91 F. 2d 998 (1937):

> "The allowance of $2,000 to complainant's attorneys as a counsel fee we have power to review. * * *"

And since that statement the Circuit Court of Appeals for the Second Circuit said in *Davilla* v. *Brunswick*, 94 F. 2d 567, (cert. den. 304 U.S. 572) (1938):

> "The court granted an allowance of $2000 as counsel fees. This was excessive. Counsel fees should be commensurate with the services necessarily rendered and the success obtained."

Again in *Sheldon*, supra, the Circuit Court of Appeals reduced the amount allowed for attorneys' fees.

That the fee allowed in this case was more than generous and if anything should have been further

reduced along with the allowance to the Master may be seen from a comparison of the amount of counsel fees and judgments in cases where judgment has been rendered for the plaintiff.

**Fee Awards to Prevailing Plaintiffs**

| | Damages (or Profits) | Attorney's Fees |
|---|---|---|
| *Universal Film Mfg. Co. v. Copperman*, 212 F. 301, aff'd 218 F. 577, 2nd Cir. | 368.00 | 250.00 |
| *S. E. Hendricks v. Thomas Pub. Co.*, 242 Fed. Rep. 37, 2nd Cir. (1917) | 2,500.00 | 2,500.00 |
| *Stodart v. Mutual Film Corp.*, 249 Fed. 507 D. C., S. D. N. Y. (1917) | 900.00 (later changed to $500) | 300.00 |
| *M. Witmark & Sons v. Pastime Amusement Co.*, 298 Fed. Rep. 470 (1924) | 250.00 | 100.00 |
| *Witmark v. Calloway*, 22 F. 2d 412 (1927). | 250.00 | 250.00 |
| *Buck v. Hezetis*, 24 F. 2d 876 (1928) | 250.00 | 50.00 |
| *Buck v. Lester*, 24 F. 2d 877 (1928) | 250.00 | 50.00 |
| *Buck v. Duncan; Same v. Jewell-La Salle Realty Co.*, 32 F. 2d 366 (1929) | 250.00 | 100.00 |
| *Buck v. Milan*, 32 F. 2d 622 (1929) | 500.00 | 100.00 |
| *Schelberg v. Empringham*, 36 F. 2d 991 (1929) Note: Payable by three defendants: $1,500 by Empringham; $750 by Bender; $250 by H. E. Soc. | 8,000.00 | 2,500.00 |
| *Sebring Pottery Co. v. Steubenville Pottery Co.*, 9 F. Supp. 384 (1934) | 2,500.00 | 1,800.00 |

| | Damages (or Profits) | Attorney's Fees |
|---|---|---|
| *Blackburn* v. *Southern California Gas Co.*, 14 F. Supp. 553 (1936) | 750.00 | 750.00 |
| *Freedman* v. *Milnag-Leasing Corp.*, 20 F. Supp. 802 (1937) | 2,000.00 | 1,000.00 |
| *Cory* v. *Physical Culture Hotel*, 88 F. 2d 411 (1937) | 5,000.00 | 2,500.00 |
| *Hartfield* v. *Peterson*, 91 F. 2d 998 (1937) | 5,000.00 | 2,000.00 |
| *Freedman* v. *Milnag Leasing Corp.*, 20 F. Supp. 803 (1937) | 2,000.00 | 1,000.00 |
| *Buck* v. *Russo*, 25 F. Supp. 317 (1938) | 500.00 | 100.00 |
| *Buck* v. *Newsreel, Inc.*, 25 F. Supp. 787 (1938) | 1,000.00 | 100.00 |
| *Buck* v. *Ridgway Const. Co.*, 25 F. Supp. 690 (1938) | 500.00 | 50.00 |
| *Buck* v. *Spanish Gables, Inc.*, 26 F. Supp. 36 (1938) | 250.00 | 100.00 |
| *Buck* v. *Dacier*, 26 F. Supp. 37 (1938) | 500.00 | 100.00 |
| *Buck* v. *Sarola Restaurant*, 27 F. Supp. 289 (1938) | 500.00 | 100.00 |
| *Davilla* v. *Brunswick-Balke Collander Co.*, 94 F. 2d 567 C. C. A. 2nd Cir. (1938) Note: Award of $2,000 called excessive by Circuit Ct. certiorari denied, 304 U. S. 572. | 1,057.73 | 1,000.00 |
| *Zenn* v. *National Golf Review, Inc.*, 27 F. Supp. 732 (1939) | 1,000.00 | 400.00 |
| *Buck* v. *Lisa*, 28 F. Supp. 379 (1939) | 250.00 | 50.00 |
| *Advertisers Exchange, Inc.* v. *Laufe*, 29 F. Supp. 1 (1939) | 1,250.00 | 150.00 |
| *Sheldon* v. *Moredall Realty Corp.*, 29 F. Supp. 729 (1939) | 3,099.14 | 1,500.00 |

| | Damages (or Profits) | Attorney's Fees |
|---|---|---|
| *Eliot* v. *Ware-Marston, Inc.*, 30 F. Supp. 301 (1939) | 500.00 | 250.00 |
| *Zuckerman* v. *Dickson*, 35 F. Supp. 903 (1940) | 1,250.00 | 100.00 |
| *Burndy Engineering Co.* v. *Penn-Union Electric Corp.*, 36 F. Supp. 35 (1940) | 4,000.00 | 1,000.00 |
| *Sammons* v. *Larkin*, 38 F. Supp. 649 (1940) | 7,664.99 | 1,500.00 |
| *Raymor Ballroom Co.* v. *Buck*, 110 F. 2d 207 aff'g 29 F. Supp. 119 (1940) | 500.00 | 100.00 |
| *Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 106 F. 2d 45, 309 U. S. 390 (1949) | 587,604.37 | 10,000.00 |
| Note: This case involved an accounting of profits which totalled $1,655,269.15. It was apportioned at $587,604.37 and ultimately reduced to $118,000. The fee stated was for preparation of trial and for the trial. | | |
| *Kraft* v. *Cohen*, 38 F. Supp. 1022 (1941) | 750.00 | 300.00 |
| *Buck, et al.* v. *Cecere*, 45 F. Supp. 441 (1942) | 250.00 | 100.00 |
| *Stonesifer* v. *Twentieth Century-Fox Film Corp.*, 48 F. Supp. 196 aff'd 140 F. 2d 579 (1942). | 3,960.00 | 1,000.00 |
| Note: Total net profits were $19,800. Judgment by apportionment was $3,960. Citing Sheldon v. Metro-Goldwyn Pictures Corporation. | | |
| *Burndy Engineering Co. Inc.* v. *Sheldon Service Corp.*, 127 F. 2d 661 (1942) | 3,500.00 | 2,000.00 |
| Note: Fees based on multifarious issues of law and fact. | | |

| | Damages (or Profits) | Attorney's Fees |
|---|---|---|
| *Adventures In Good Eating, Inc. v. Best Places To Eat, Inc.*, 131 F. 2d 809 (1942) | 3,500.00 | 1,700.00 |
| *Sammons v. Colonial Press, Inc.*, 126 F. 2d 341 (1942) | 7,486.00 | 1,500.00 |
| *Advertisers Exchange, Inc. v. Bayless Drug Store, Inc.*, 50 F. Supp. 169 (1943) | 250.00 | 150.00 |
| *Law v. National Broadcasting Co. Inc., et al.*, 51 F. Supp. 798 (1943) | 2,180.00 | 250.00 |
| *Rudolf Lesch Fine Arts, Inc. v. Metal*, 51 F. Supp. 69 (1943) | 1.00 | 300.00 |
| *Select Theatres Corp. v. The Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (1943) | 11,500.00 | 2,000.00 |
| *Remick Music Corp. v. Interstate Hotel Co.*, 58 F. Supp. 523 (1944) | 4,750.00 | 2,400.00 |
| *Phillips v. The Constitution Publishing Co.*, 72 U. S. P. Q. 69 (1947) | 250.00 | 250.00 |
| *Whitman Publishing Company v. Writesel*, 83 U. S. P. Q. 535 (1949)<br>Note: Special Counsel brought from New York was a specialist in field of copyright law. | 10,850.00 | 1,500.00 |
| *Alfred Bell & Co. Ltd. v. Catalda Fine Arts*, 86 F. Supp. 399 (1949). Modified on other grounds—191 F. 2d 99<br>Note: Fees proportioned among three separate defendants. | 10,000.00 | 7,500.00 |
| *Toksvig v. Bruce Pub. Co., et al.*, 181 F. 2d 664 (1950) | 1,000.00 | 500.00 |
| *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 193 F. 2d 162 (1951), aff'd 344 U. S. 228 (1952) | 5,000.00 | 2,000.00 |

| | Damages (or Profits) | Attorney's Fees |
|---|---|---|
| *Malsed v. Marshall Field & Co.*, 96 F. Supp. 372 (1951) | 100.00 | 500.00 |
| *Gordon v. Weir*, 111 F. Supp. 117 (1953) | 3,874.00 | 1,000.00 |
| *Barry Alter Co. v. A. E. Bordon Co.*, 121 F. Supp. 941 (1954) | 6,500.00 | 1,000.00 |
| *Hollywood Jewelry Mfg. Co. v. Dushkin*, 136 F. Supp. 738 (1955) | 3,500.00 | 500.00 |
| *Royal v. RCA*, 107 U. S. P. Q. 173 (1955) | 510.00 | 150.00 |
| *M. J. Golden & Co. v. Pittsburg Brewing Co.*, 137 F. Supp. 455 (1956) | 1,000.00 | 300.00 |
| *Nikanov v. Simon & Schuster Inc.*, 144 F. Supp. 375, aff'd 246 F. 2d 501 (1956) | 5,000.00 | 1,000.00 |
| *Harms, Inc. v. Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (1958) | 1,000.00 | 250.00 |
| *American Visuals Corp. v. Holland*, 261 F. 2d 652 (1958) | 5,000.00 | 1,500.00 |
| *Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Co. Inc.* | 3,000.00 | 1,500.00 |
| *Dan Kasoff, Inc. v. Max Alpern, et al.*, 171 F. Supp. 603 (1959) | 1,500.00 | 750.00 |
| *Massapequa Publishing Co., Inc. v. Observer, Inc. et al.*, 191 F. Supp. 261 (1961) | 250.00 | 250.00 |

A similar but not as extensive a table was published in the Copyright Law Revision Studies prepared for the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, Study No. 23, Table B, cited by the court below (Petition p. 67).

Following its citation of the Table of Fees the court said:

> "In the case at bar, while a substantial amount of time was spent by plaintiff's counsel, *much of it was necessitated by counsel's unfamiliarity with the field.*" (Emphasis supplied)

The District Court felt that much unnecessary work had been done and said:

> "While the number of hours spent on the case was great, the presentation excellent and the result successful, *I cannot shut my eyes to the fact that counsel were dealing with an unfamiliar subject* and *cannot fairly charge defendants for their education.*" (Emphasis supplied) (Petition p. 56)

And the Master in his Report quoted from the testimony of Mr. Birdsall:

> "Q. May I ask how many cases you have tried on copyright? A. One.
>
> Q. What case was that? A. The instant case.
>
> Q. The instant case? A. Yes.
>
> Q. May I suggest that a specialist, or a man knowing the field, might have spent less time? A. Yes, you may suggest it.
>
> Q. Would you accept that suggestion? A. Yes." (Petition p. 52)

The defendants here have been burdened with payment for an unnecessarily lengthy record and for unnecessary lengthy hearings before the Master. The unnecessary length was due solely to the inexperience of counsel for the plaintiffs. Assuming the testimony

of Mr. Birdsall that approximately fifteen hundred hours were spent on this case, analyzed that corresponds roughly to two hundred working days, excluding weekends and holidays, and would have meant a solid year of work excluding from consideration any other matters.

The Court below was generous in its allowance particularly when that allowance is compared with usual allowances for fees in copyright matters by the courts.

The District Court and the Court below were generous in making allowance to the Master for a record of some three hundred and ninety-one pages when the proof of the profits was contained in a three page exhibit. There is no reason why this defendant, a reputable law book publishing house, should have been so muleted.

In addition to the *Hendricks* case, supra, this petitioner has cited what he calls similar decisions (Petition p. 12). None of these decisions involve the Copyright Statute or analagous statutes.

*Mercantile-Commerce Bank & Trust Co.* v. *Southeast Arkansas Levee District*, 106 Fed. 2d 966, involved the fixing of fees in a bankruptcy matter.

*Lackner* v. *Illinois Bell Telephone Co.*, 111 Fed. 2d 136 (cert. den. 311 U.S. 652), involved fixing of attorneys' fees on a petition for reduction of telephone rates.

*U.S.* v. *Anglin & Stevenson*, 145 Fed. 2d 622 (cert. den. 324 U.S. 844) fixed a fee in the matter under an Indian inheritance fund.

The decision of the court below was consonant with its previous decisions, including those which had been upheld by this Court. There is no question presented by petitioners' question B (Petition p. 6).

## POINT III

**Neither with regard to the apportionment of profits nor the allowance of counsel fees has the Court of Appeals rendered a decision in conflict with the decision of another Court of Appeals on the same subject, nor has it decided any important question of federal law which has not been settled by this Court.**

**Wherefore, your respondents pray that this Petition be denied.**

Respectfully submitted

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